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In the Supreme Court of the United States

OCTOBER TERM, 1962

H. HENRY YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. II,[1] 177–179; Pet. App. 14–15) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1962 (R. II, 179). The petition for a writ of certiorari was filed on May 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The government's "Record Appendix to Motion to Affirm or Dismiss" in the court below is designated herein as "R. I." and petitioner's "Record Appendix to Brief for Appellant" as "R. II."

QUESTIONS PRESENTED

1. Whether the district court adequately complied with Rule 11, F.R. Crim. P., before accepting petitioner's pleas of guilty made after the trial began.

2. Whether the court properly denied, without a full hearing, a pre-sentence motion to withdraw pleas of guilty, where counsel stated the reason for making the motion and did not request a hearing.

3. Whether at a hearing on a post-sentence motion to withdraw pleas of guilty, the court could, in the circumstances of this case, proceed without ordering a psychiatric examination of petitioner, where new counsel, retained for the motion, made no request for such an examination.

4. Whether the court, after a hearing, properly denied petitioner's post-sentence motion for leave to withdraw pleas of guilty.

RULES INVOLVED

Rule 11, F.R. Crim. P., provides:

> PLEAS. A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 32, F.R. Crim. P., provides in part:

* * * * *

> (d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo*

contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * * *

STATEMENT

Petitioner and three others were charged in a 22-count indictment returned in the United States District Court for the District of Massachusetts with substantive offenses of concealing from the trustee in bankruptcy assets of certain corporations, in violation of 18 U.S.C. 152, and with a conspiracy to commit such violations (R. I, 6–36). Petitioner's co-defendants pleaded guilty (R. I, 57). Petitioner pleaded not guilty (R. I, 1).

1. At the outset of petitioner's trial, on October 3, 1961, the government attorney made an opening statement detailing the evidence to be produced as to petitioner's involvement in the bankruptcies of the Madison Drug Company and the other corporations named in the indictment (R. I, 41–55). After a noon recess, petitioner indicated his desire to change his pleas of not guilty to guilty on substantive counts 1 and 2, both of which involved only the Madison Drug Company, and on the conspiracy count, which involved Madison and a number of other corporations.[2] The

[2] Petitioner later testified that it was during this recess following the government's opening statement that he first discussed changing his plea with his counsel (R. I, 90).

following colloquy occurred in open court (R. I, 55–56):

(Conference in the lobby.)

The COURT: Take the plea.

The CLERK: *United States* v. *H. Henry Young.*

MR. NOONAN [government attorney]: I understand, may it please the Court, that there is to be a change of plea in this case. May I ask that it be taken?

The COURT: Take the plea, Mr. Clerk.

The CLERK: H. Henry Young, to three counts of this 22 count indictment, Count 1, Count 2, and Count 22, charging you with willfully, unlawfully and knowingly concealing property of the bankrupt estate from the trustee in bankruptcy and with willfully and knowingly conspiring to defeat the bankruptcy law, you have previously pleaded not guilty. Do you wish to change your plea?

Defendant H. H. YOUNG: Yes, I do.

The CLERK: What say you now as to Counts——

Defendant H. H. YOUNG: On Count 1 and 2, that is specifically on Madison?

The COURT: Yes, that's right. Counts 1 and 2 refer to Madison.

Defendant H. H. YOUNG: Yes, sir. I plead guilty.

The CLERK: What say you to Count 1?

Defendant H. H. YOUNG: Guilty.

The CLERK: What say you to Count 2?

Defendant H. H. YOUNG: Guilty.

The CLERK: What say you to Count 22?

Defendant H. H. YOUNG: Guilty.

The COURT: Now, you entered that plea voluntarily, did you, Mr. Defendant?

Defendant H. H. YOUNG: Yes, sir.

* * * * *

2. A sentencing hearing was held on December 14, 1961, at which counsel discussed the dismissal of counts 3 through 21 as to petitioner (R. I, 57, 58). Counsel for petitioner requested the court to entertain a motion to withdraw petitioner's plea of guilty as to counts 1, 2 and 22, stating (R. I, 58):

> Mr. HOMANS [defense counsel]: May it please the Court, * * * before we came here today I had a good deal of discussion with the defendant Henry and he insisted to me, and insists he pleaded guilty, as your Honor knows, to Counts 1 and 2 with respect to the matters from the drug company and also to Count 22, the conspiracy count.
>
> * * * * *
>
> I make this request with a good deal of hesitation, your Honor, but after a great deal of discussion with my client, who states, and I think the transcript will show on the date he entered his plea to the matters—that is, to Counts 1 and 2 and the conspiracy count, he indicated in open court that he was only acknowledging his guilt with respect to the matters in Counts, and so much of conspiracy as related to Madison.

Counsel stated that petitioner was distressed because he felt that although he had pleaded not guilty to counts other than 1, 2 and 22, matters relating to the other counts would be considered against him (R. I, 59). The following ensued (R. I, 59):

The COURT: Well, as I understand it, all of the counts as to which any other defendants have pleaded not guilty are to be dismissed; do I understand that?

Mr. NOONAN: Henry Young pleaded guilty to Counts 1, 2 and 22, and we are now dismissing Counts 3 through 21, all the rest to which he did not plead guilty.

The COURT: Counsel, do you want to withdraw your plea of guilty to Counts 1 and 2 and the conspiracy count; is that your motion?

Mr. HOMANS: Yes, sir. That is the motion.

The COURT: And go to trial?

Mr. HOMANS: Yes, sir.

The COURT: Denied.

* * * * *

Thereafter government counsel recommended that petitioner be given concurrent sentences of imprisonment for four years on each count, a $5,000 fine on each of counts 1 and 2, and a $10,000 fine on count 22, for a total fine of $20,000 (R. I, 69). Defense counsel recommended no more than one year's imprisonment and a smaller fine (R. I, 75). When asked by the court if he had anything to say before sentencing, petitioner stated that he had pleaded guilty to the Madison Drug Company counts and the conspiracy count only so far as Madison was concerned, upon the recommendation of his counsel that he would probably get three or four months and a suspended sentence (R. I, 76). The court imposed the sentence recommended by the government attorney, but stayed execution of sentence until December 19, 1961 (R. I, 78, 38–39, 80).

3. On December 18, 1961, petitioner, through a new attorney, Mr. Bernstein, filed a written motion under Rule 32(d), F.R. Crim. P., for leave to withdraw the guilty pleas to counts 1, 2 and 22, and to restore the case to the trial calendar, alleging that the pleas had not been freely and understandingly entered (R. I, 36). Attached to the motion was petitioner's affidavit that he was not guilty; that his pleas of guilty to counts 1, 2 and 22 related only to the charges involving Madison Drug Company; and that he had been informed that the ultimate sentence would be probation with a small fine (R. I, 36–37).

At a hearing on this motion on December 22, 1961, petitioner's wife testified that when petitioner pleaded guilty on October 3, 1961, he was very pale and upset (R. I, 85–86). Petitioner testified that at that time he was distraught; that his "speech impediment came back again" (R. I, 95, 96). He stated that, while he was "under medication" at the time of the hearing, he did not remember being under medication (except perhaps for taking "an aspirin or something") on the day he changed his plea (R. I, 106–107). He said that when he was discharged from the Army he had been given a 10% disability allowance for a nervous disorder and that he had received 26 hours of psychiatric and group therapy from the Veterans Administration for this nervous disorder in 1946 and 1947 (R. I, 107).

Petitioner explained that he had changed his plea from not guilty to guilty because his former attorney, Mr. Homans, had said that it had been indicated to him at the United States Attorney's office that upon

pleas of guilty, petitioner would get a prison sentence of only three or four months, and that Mr. Homans would plead for a suspended sentence (R. I, 93–95). Petitioner's testimony was that his guilty pleas on counts 1, 2 and 22 were meant to apply only to the charges relating to the Madison Drug Company, and not to the other bankrupt companies mentioned in the conspiracy count 22 (R. I, 91–92). Petitioner admitted knowing, when he pleaded guilty, that companies other than Madison Drug were involved in count 22 (R. I, 98–99). Petitioner stated that he did not discuss count 22 with Mr. Gottlieb, an attorney he had retained before he retained Mr. Homans (R. I, 99), and that he did not remember discussing the conspiracy count with Mr. Homans (R. I, 101–102).

Mr. Homans testified that he discussed with petitioner the conspiracy count and his knowledge of companies other than Madison Drug mentioned in that count (R. I, 111–112). Petitioner understood that counts 1 and 2 involved only Madison Drug, and Mr. Homans explained that a guilty plea to count 22 would be to "the whole conspiracy count" (R. I, 117–118). Mr. Homans testified that, when he had discussed a possible guilty plea with government counsel, counsel had refused to state in advance of the plea what recommendation he would make, but said that it would be for a jail sentence (R. I, 114–115). Mr. Homans told petitioner he thought the government would recommend imprisonment for one or two years (R. I, 115–116). Mr. Homans learned what the government's recommendation would be about three days before sentencing (R. I, 115).

There were introduced in evidence (Gov. Ex. 1–A and 1–B; R. II, 118–171) memoranda of office conferences petitioner had with Mr. Gottlieb regarding the indictment (R. I, 127). These memoranda disclosed that petitioner had discussed with Mr. Gottlieb the charges in counts 1 and 2 (R. II, 168), and in count 22 (R. II, 137–150). The government also introduced a certified copy of the government counsel's opening argument at the trial (Gov. Ex. 2), which petitioner had heard (R. I, 131–132), detailing the proposed proof under the various counts in the indictment.

4. On December 26, 1961, the post-sentence motion for leave to withdraw the guilty pleas was denied (R. I. 5). On appeal from the denial of this motion (R. I, 39–41), the judgment was affirmed (R. II, 179). The court of appeals was of the opinion that there was nothing to show that petitioner's "change of plea was not made voluntarily and with full knowledge of its consequences or that it was made in reliance upon representations of the United States Attorney that he would recommend a light sentence" (Pet. App. 15).

ARGUMENT

1. Petitioner's plea of guilty to three counts of a 22-count indictment was made after the case had gone to trial and the United States Attorney had made an opening statement detailing the evidence by which the government intended to prove its case. Petitioner was then represented by counsel of his own choosing. In these circumstances, the questioning by the court before the plea was accepted was clearly adequate

compliance with Rule 11. Not only were the circumstances such that petitioner must have known the nature of the charges, but the clerk described counts 1, 2 and 22 as charging petitioner with "willfully, unlawfully and knowingly concealing property of the bankrupt estate from the trustee in bankruptcy and with willfully and knowingly conspiring to defeat the bankruptcy law," and petitioner himself mentioned that he knew counts 1 and 2 referred specifically to the Madison Drug Company (R. I, 56). Petitioner announced his plea of guilty to each separate count, and in response to the court's question stated that the pleas were entered voluntarily (R. I, 56). The trial court thus had before it sufficient assurance that the pleas were voluntarily entered with knowledge of the charges.[3]

2. There is no merit to petitioner's argument that the trial court abused its discretion in denying his pre-sentence motion to withdraw his pleas of guilty without a full hearing (Pet. 8–10). While it was not made altogether clear, petitioner was apparently claiming that he intended to plead guilty on counts

[3] The decision below is not in conflict with *United States* v. *Mack*, 249 F. 2d 421 (C.A. 7) and *United States* v. *Lester*, 247 F. 2d 496 (C.A. 2), neither of which involved a plea during trial. In *Mack*, the court did not ask the defendant whether she was pleading guilty voluntarily and it later appeared that she might have been acting under domination of her husband. In *Lester* defendant was without counsel and the court did not ask him whether he was pleading guilty voluntarily. The later hearings in both of these cases suggested involuntariness. Here the evidence at the hearing on the motion to withdraw the pleas of guilty showed that petitioner had conferred with counsel over a long period of time before the plea was changed (see pp. 8–9, *supra*).

1, 2 and 22 as to the Madison Drug Company only; that, since other corporations were mentioned in the conspiracy count, he was afraid that "the merits of all of the counts, including the ones to which his plea of not guilty still remains outstanding, will be gone into"; and that he therefore wished to withdraw all guilty pleas (R. I, 58–59). Whatever superficial plausibility this line of reasoning might have had was seriously discredited by the facts (1) that his plea of guilty to count 22 had been completely unqualified, (2) that he had given no indication at the time he changed his pleas to counts 1, 2 and 22 that those pleas were limited to Madison,[4] and (3) that the most this reasoning would justify would be withdrawal of the plea to count 22. Accordingly, it was altogether proper for the court to deny the presentence motion to withdraw the guilty pleas, and it was equally proper for it to do so without hearing, in view of the fact that petitioner's counsel did not ask for a hearing or for any opportunity to present testimony by petitioner or any other witness in support of the motion; nor did he make any offer of proof when the motion was denied. We submit that both the substance and the procedure of the trial court's denial of this motion, made in the course of the sentencing process,[5] were entirely correct.

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[4] It is an altogether reasonable hypothesis that petitioner's mention of "Madison" in connection with counts 1 and 2 was solely for identification.

[5] From the hearing on the later motion to withdraw, it appears that petitioner's counsel knew at that time what sentence the government would recommend (R. I, 115).

3. Neither by any contention that he made nor by any evidence that he introduced at the post-sentencing hearing did petitioner raise any substantial question as to his mental condition at the time his pleas of guilty were entered. Petitioner's mental condition was not referred to with respect to the presentence motion to withdraw the guilty pleas, nor did his written motion to withdraw the pleas or the supporting affidavit (R. I, 36–37) mention mental incompetency as a reason for the requested withdrawal.[6] The testimony of petitioner and his wife that he was pale and upset the day he changed his pleas (see p. 7, *supra*) described nothing more than would be expected of any person pleading guilty to a crime that might result in imprisonment. Petitioner's testimony (see p. 7, *supra*) and a statement in a government exhibit (Gov. Ex. 1–B, R. II, 150–151) that petitioner was given a 10% disability allowance and received psychiatric therapy for a nervous disorder at the time of his Army discharge in 1946–47[7] certainly did not put the court on notice that petitioner was mentally incompetent to plead guilty some 15 years later. Nor is there anything inconsistent in petitioner's having a speech

[6] Even in his argument at the conclusion of the post-sentence hearing, petitioner's counsel referred to him only as "distraught," "under a nervous strain" (R. I, 132) and made no suggestion of mental incompetence.

[7] The exhibit was introduced not by petitioner to show mental incompetence but by the government to prove that petitioner's counsel had discussed the meaning of the counts in the indictment with him.

impediment[8] and still being able to plead guilty voluntarily and understandingly. Petitioner's counsel did not offer any medical records showing disability of any kind and made no request that the court order a psychiatric examination. Under the circumstances, the court was not obligated to do so.

Dandridge v. *United States*, 356 U.S. 259 (reversing a conviction "[u]pon consideration of the entire record and the confession of error by the Solicitor General"), upon which petitioner relies (Pet. 10–11), is not in point. Unlike the situation here, there was evidence in that case that the accused was suffering from a disabling illness and was actually hospitalized both shortly before and shortly after the date of his plea of guilty, which he later sought to withdraw on the ground that he had been ill. See Memorandum for the United States on writ of certiorari, *Dandridge* v. *United States*, No. 609, Oct. Term, 1957, pp. 7, 8, 13, 15, 16.

4. Petitioner contends in effect that, since he executed an affidavit that his pleas were based on information that he would receive probation and a small fine (R. II, 63) and since he testified that his attorney told him it had been indicated by the government attorney that petitioner would get only three or four months' imprisonment and a small fine (R. II, 78), the court was bound to believe this evidence and to permit withdrawal of the pleas (Pet. 11–13). The district court, however, did not accept

[8] There is no indication in the record that petitioner stuttered at the time he changed his plea; petitioner himself could not remember having done so (R. I, 107).

this evidence but credited the testimony by Mr. Homans, petitioner's counsel, that before the plea of guilty was accepted government counsel had refused to divulge his recommendation beyond saying it would be for a jail sentence and that counsel had advised petitioner it would probably be for one or two years (R. I, 114–116). Although the district court wrote no opinion, it is clear that it rejected petitioner's testimony, as it was at liberty to do. This circumstance distinguishes *United States* v. *Lias,* 173 F. 2d 685 (C.A. 4), where the district judge [redacted] accepted the defendant's sworn allegation that, as a result of what was said by the judge to his attorneys, he was led to believe that he would receive probation if he pleaded guilty.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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